

1  
2  
3  
4  
5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 KRISTA PEOPLES,

9 Plaintiff,

10 v.

11 UNITED SERVICES AUTOMOBILE  
12 ASSOCIATION, *et al.*,

13 Defendants.

14 \_\_\_\_\_  
15 JOEL STEDMAN, *et al.*,

16 Plaintiffs,

17 v.

18 PROGRESSIVE DIRECT INSURANCE  
19 COMPANY,

20 Defendant.

NO. C18-1173RSL

NO. C18-1254RSL

ORDER CONSOLIDATING CASES  
AND CERTIFYING QUESTION TO  
THE WASHINGTON SUPREME  
COURT

21 These matters came separately before the Court on the defendant insurance companies'  
22 motions for judgment on the pleadings. Defendants seek, among other things, dismissal of the  
23 Washington Consumer Protection Act ("CPA") claims asserted against them on the ground that  
24 plaintiffs have not alleged an injury to business or property. Dkt. # 12 at 11-13 in C18-1173RSL;  
25 Dkt. # 19 at 6-8 in C18-1254RSL. The Court finds that the viability of plaintiffs' CPA claims  
26

27 ORDER CONSOLIDATING CASES AND  
28 CERTIFYING QUESTION TO THE  
WASHINGTON SUPREME COURT - 1

1 can and should be tested together. It appears that consolidation solely for the purpose of  
2 certifying this issue to the Washington Supreme Court will improve the efficient resolution of  
3 the cases.<sup>1</sup>

4  
5 Plaintiffs in the above-captioned actions allege that the defendant insurers engaged in per  
6 se unfair acts in the business of insurance when they curtailed plaintiffs' benefits under the  
7 Personal Injury Protection ("PIP") provisions of their automobile policies. Ms. Peoples alleges  
8 that United Services Automobile Association ("USAA") refused to pay medical provider bills  
9 whenever a computerized review process indicated that the bill ran afoul of a pre-determined  
10 screen or limit. She alleges that the failure to investigate or otherwise make an individualized  
11 determination regarding the reasonableness or necessity of the provider's charges before denying  
12 payment violates Washington's insurance regulations. See Folweiler Chiropractic, PS v. Am.  
13 Family Ins. Co., 5 Wn. App.2d 1002, 2018 WL 4087573, \* 3-4 (Aug. 27, 2018). Mr. Stedman  
14 alleges that Progressive Direct Insurance Company ("Progressive") limited or terminated his PIP  
15 benefits when it unilaterally determined that the insured had reached "maximum medical  
16 improvement," a justification that is not authorized by Washington's insurance regulations. See  
17 Durant v. State Farm Mut. Auto. Ins. Co., 191 Wn.2d 1 (2018). USAA and Progressive seek  
18 dismissal of plaintiffs' CPA claims because the primary insurance benefit they seek, namely  
19 payment of medical bills and expenses, is or arises from a "personal injury" not recoverable  
20 under the CPA.  
21  
22

23 RCW 19.86.090 provides a right of action to "[a]ny person who is injured in his or her  
24

---

25  
26 <sup>1</sup> The Court has issued separate orders regarding the other issues raised in defendants' motions.

1 business or property by a violation of” the Consumer Protection Act. “The CPA’s requirement  
2 that injury be to business or property excludes personal injury, ‘mental distress, embarrassment,  
3 and inconvenience.’” Frias v. Asset Foreclosure Servs., Inc., 181 Wn.2d 412, 431 (2014)  
4 (quoting Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 57 (2009)). Damages arising from  
5 personal injury, including medical expenses, pain and suffering, and reimbursement for lost  
6 wages, are not injuries to business or property and are therefore not recoverable under the CPA.<sup>2</sup>

8 It is relatively common for Washington drivers who believe their insurance company  
9 failed to make a good faith investigation of their claim or otherwise violated applicable  
10 insurance regulations to bring a CPA claim against the insurer. These claims seek payment under  
11 the terms of the policies - including payments and reimbursements for medical expenses - and  
12 have been permitted to proceed despite the connection to “personal injuries.” See, e.g., Keodalah  
13 v. Allstate Ins. Co., 3 Wn. App. 2d 312 (2018) (motorist injured in automobile accident brought  
14 a CPA claim against the adjuster who handled his underinsured motorist (“UIM”) claim); Nelson  
15 v. Geico Gen. Ins. Co., 192 Wn. App. 1007, 2016 WL 112475 (2016) (pedestrian struck by  
16 motor vehicle brought a CPA claim against insurer for failing to disclose all the benefits of the  
17 relevant policies); Anderson v. State Farm Mut. Ins. Co., 101 Wn. App. 323 (2000) (remanding  
18 for trial a CPA claim regarding improper claims handling and violations of insurance regulations  
19 despite the fact that the UIM claim arose from a collision in which plaintiff fractured her leg and  
20 suffered other injuries); Van Noy v. State Farm Mut. Auto. Ins Co., 98 Wn. App. 487 (1999)  
21  
22  
23

---

24 <sup>2</sup> Even some forms of property damage have been deemed not recoverable if the damage arises  
25 from an event that also caused personal injuries. See Hiner v. Bridgestone/Firestone, Inc., 91 Wn. App.  
26 722, 730 (1998) (precluding recovery for damage to a vehicle where the damage occurred in the same  
collision that caused personal injuries).

1 (finding that a CPA claim could proceed where class members asserted that, as a result of State  
2 Farm's delay in making coverage determinations, they had incurred medical or therapy expenses  
3 that they otherwise would have avoided had the claim been timely denied); Escalante v. Sentry  
4 Ins. Co., 49 Wn. App. 375, 387 (1987) (holding that a passenger injured in an auto accident had  
5 standing to bring a CPA claim against the insurer for bad faith handling of the claim). The  
6 question raised in the above-captioned actions is whether these cases erroneously assumed that a  
7 CPA claim against an insurer was viable where the insured was injured in the underlying  
8 collision.  
9

10 The insurers rely heavily on Ambach v. French, 167 Wn.2d 167 (2009). In Ambach, the  
11 Washington Supreme Court made clear that artfully pleading "economic" injuries arising from a  
12 tortfeasor's negligence - the same negligence that also caused bodily injury - cannot support a  
13 CPA claim. Ambach had shoulder surgery in 2002: she suffered a staph infection and had to  
14 have a second corrective surgery. Ambach sued the first surgeon, French, for negligence and  
15 violation of the CPA. The CPA claim was based on allegations of economic loss related to the  
16 excess cost of the initial surgery over alternative, conservative treatments Ambach could have  
17 chosen had French not deceived her regarding the benefits of the procedure he was selling. The  
18 Supreme Court noted that "[w]here plaintiffs are both physically and economically injured by  
19 one act, courts generally refuse to find injury to 'business or property' as used in the consumer  
20 protection laws" and held that "because Ambach's purported CPA injury is payment for a  
21 surgery from which personal injury also arose, she has failed to state a prima facie CPA claim."  
22 Id. at 174 and 179.  
23  
24

25 The actual holding of Ambach does not bar the CPA claims asserted in the consolidated  
26

1 actions. Neither Ms. Peoples nor Mr. Stedman are attempting to bring a CPA claim against the  
2 persons who caused them bodily injury, as was the case in Ambach. Instead, they are suing a  
3 third-party to recover the benefits of insurance contracts they had previously purchased in order  
4 to protect themselves from economic losses arising out of automobile collisions. Plaintiffs are  
5 not attempting to hold the insurers liable for their collisions. Rather, it is the separate act of bad  
6 faith claim handling in violation of Washington's insurance regulations that gives rise to  
7 plaintiffs' claims against their insurers.

8  
9 Ambach, however, contains language suggesting that a demand for insurance coverage to  
10 reimburse the insured for medical expenses or to pay medical providers is so connected to the  
11 insured's personal injuries, that a CPA claim challenging the way the insurer handled the claim  
12 is barred. Id. at 175-76. Federal courts in this district have grabbed hold of that language,  
13 precluding CPA claims against insurers for bad faith claim handling if the damages at issue  
14 involve unpaid medical bills. Heide v. State Farm Mut. Auto. Ins. Co., 261 F. Supp. 3d 1104,  
15 1109-10 (W.D. Wash. 2017) ("Injuries that are derivative of a plaintiff's personal injuries do not  
16 constitute an injury to business or property sufficient to sustain an action under the CPA."); Dees  
17 v. Allstate Ins. Co., 933 F. Supp 1299, 1310-11 (W.D. Wash. 2013) ("Although [the plaintiff] is  
18 correct that money is property, and [the insurance company's] alleged failure to pay her medical  
19 bills may have caused her to pay those bills, payment for medical treatment 'does not transform  
20 medical expenses into business or property harm.'" (quoting Ambach, 167 Wn.2d at 175));  
21 Haley v. Allstate Ins. Co., C07-1494RSM, 2010 WL 4052935, at \*7-8 (W.D. Wash. Oct. 13,  
22 2010) (dismissing CPA claim based on property damage consisting of the loss of funds  
23 necessary to pay uncovered medical bills). There is some indication that the state courts interpret

1 Ambach more narrowly and have not yet embraced a categorical bar against CPA claims brought  
2 by an injured insured. See Williams v. Lifestyle Lift Holdings, Inc., 175 Wn. App. 62, 73 (2013)  
3 (“The act that caused the alleged personal injury to Williams was the surgery; the acts that  
4 caused her alleged consumer injury were the advertising and sales techniques. Williams’  
5 Consumer Protection Act claim does not depend on proof that she sustained a personal injury as  
6 a result of the surgery. It depends on proof that the surgery was deceptively marketed, like a  
7 used car advertised as being new.”); Hayes v. USAA Cas. Ins. Co., 185 Wn. App. 1055, 2015  
8 WL 677143, at \*5-6 (2015) (noting that then-Judge Mary I. Yu rejected the insurer’s argument  
9 that a CPA claim challenging the way the insurer handled PIP claims was a claim for personal  
10 injuries and provided plaintiffs an opportunity to show that they had paid providers for charges  
11 that were unreimbursed and/or had “out-of-pocket” costs they would not have had the insurer  
12 complied with the insurance regulations).

15 Ms. Peoples alleges that, as a result of USAA’s violations of the insurance regulations,  
16 she has sustained injury to her property and damages including, but not limited to, reduced  
17 insurance benefits, investigative expenses, and out-of-pocket costs. Dkt. # 1-1 at 16-18 in C18-  
18 1173RSL. Ms. Peoples seeks an award of “actual damages to be established at trial as provided  
19 by the Consumer Protection Act . . . .” Dkt. # 1-1 at 20 in C18-1173RSL. Mr. Stedman alleges  
20 that Progressive inserted into his policy an additional reason for terminating benefits, one not  
21 authorized and expressly precluded by the insurance regulations, and failed to provide the PIP  
22 coverage for which he paid. Dkt. # 11 at 11 in C18-1254RSL. He seeks to recover all damages  
23 arising from this conduct, including “the amount of any and all medical expenses incurred by  
24 claimants following Defendant’s denial of PIP benefits.” Dkt. # 11 at 13-14 in C18-1254RSL. In

1 response to Progressive's motion to dismiss the CPA claim, Mr. Stedman argues that money he  
2 has had to pay as a result of Progressive's per se unfair acts is, in other contexts, considered  
3 cognizable damage under the CPA. He also asserts that he paid premiums for PIP coverage that  
4 was unlawfully curtailed and lost the time it took to participate in the medical examination  
5 Progressive required to determine whether he had reached maximum medical improvement.  
6

7  
8 The Court finds that certification to the Washington Supreme Court to determine how  
9 Ambach applies in the insurance context is warranted. Pursuant to RCW 2.60.020, "[w]hen in  
10 the opinion of any federal court before whom a proceeding is pending, it is necessary to  
11 ascertain the local law of this state in order to dispose of such proceeding and the local law has  
12 not been clearly determined, such federal court may certify to the supreme court for answer the  
13 question of local law involved and the supreme court shall render its opinion in answer thereto."  
14 The certification process serves the important judicial interests of efficiency and comity: as  
15 noted by the United States Supreme Court, certification saves "time, energy and resources and  
16 helps build a cooperative judicial federalism." Lehman Bros. v. Schein, 416 U.S. 386, 391  
17 (1974).  
18  
19

20 This matter involves dispositive issues regarding whether monetary losses allegedly  
21 caused by violations of the Washington insurance regulations are recoverable under the CPA  
22 notwithstanding the fact that the insured was physically injured in the underlying automobile  
23 collision and sought coverage for costs and expenses related to those injuries. Courts in this  
24 district have attempted to predict how the state's highest court would apply Ambach in the  
25 insurance context, but the input of the Supreme Court will ensure that this case proceeds to  
26

1 judgment on a firm legal footing. Comity suggests that this matter should be presented for  
2 expedited review pursuant to RCW 2.60.020.

3 For all of the foregoing reasons, the following questions are hereby certified to the  
4 Supreme Court of Washington:  
5

6 With regards to the injury to “business or property” element of a CPA claim, can  
7 insureds in Ms. Peoples’ and/or Mr. Stedman’s circumstances, who were  
8 physically injured in a motor vehicle collision and whose Personal Injury  
9 Protection (“PIP”) benefits were terminated or limited in violation of WAC 284-  
10 30-330, bring a CPA claim against the insurer to recover out-of-pocket medical  
expenses and/or to compel payments to medical providers?

11 With regards to the “injury to business or property” element of a CPA claim, can  
12 insureds in Ms. Peoples’ and/or Mr. Stedman’s circumstances, who were  
13 physically injured in a motor vehicle collision and whose Personal Injury  
14 Protection (“PIP”) benefits were terminated or limited in violation of WAC 284-  
15 30-330, bring a CPA claim against the insurer to recover excess premiums paid for  
16 the PIP coverage, the costs of investigating the unfair acts, and/or the time lost  
complying with the insurer’s unauthorized demands?

17 The Clerk of Court is directed to submit to the Supreme Court of Washington certified copies of  
18 this Order, a copy of the dockets in C18-1173RSL and C18-1254RSL, copies of Dkt. # 1-1, 12,  
19 and 31-34 in C18-1173RSL, and copies of Dkt. # 11, and 19-21 in C18-1254RSL. The record so  
20 compiled contains all matters in the pending cause deemed material for consideration of the state  
21 law questions certified for answer.  
22

23  
24 //

25  
26  
27 ORDER CONSOLIDATING CASES AND  
28 CERTIFYING QUESTION TO THE  
WASHINGTON SUPREME COURT - 8



1 The defendant insurers in this consolidated action are designated as the appellants before  
2 the Supreme Court of Washington. The Clerk of Court shall notify the parties as soon as  
3 possible, but no more than three days, after the above-described record is filed in the Supreme  
4 Court of Washington. The parties are referred to state RAP 16.16 for additional information  
5 regarding procedure before the Supreme Court.  
6

7  
8 Dated this 4th day of March, 2019.

9 

10 Robert S. Lasnik  
11 United States District Judge  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26